

# What You Need to Know About Returning to Work During COVID-19



A guide for U.S. employers and employees

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As businesses reopen and employees continue to return to workplaces this summer and fall, employers are rightfully concerned with how best to manage workplace safety and their legal and other obligations to employees. Below, we provide a general overview of the guidance and laws that are implicated.

This communication is intended as a general discussion of these matters only and is not to be considered legal advice or relied upon without direct attorney guidance concerning any particular situation. This guide focuses on federal and New York law, which are both evolving on a frequent basis. For more specific information or legal advice concerning your company's particular situation, please contact us directly.

1. **Safety obligations:** The **Occupational Safety and Health Act (OSH Act)** and the agency that enforces it, the **Occupational Safety and Health Administration (OSHA)**, require that employers keep their workplaces free of any recognized hazards that are likely to cause death or serious physical harm to employees. This is referred to as the "general duty" clause.

The OSH Act applies to nearly all private employers, including non-profits, except those regulated by other federal agencies. Violations of the general duty clause are punishable by citations from OSHA. Employees may report violations by filing complaints with OSHA. OSHA citations can be used as evidence in personal injury, wrongful death, intentional tort, and workers' compensation lawsuits. The OSH Act also prescribes standards specific to certain industries. States may also have occupational health and safety plans and standards and may have different or more stringent requirements, including for particular industries.

OSHA has published guidance stating that during all phases of reopening, employers should implement strategies for basic hygiene (e.g., hand hygiene, cleaning, and disinfection), social distancing, identification and isolation of sick employees, workplace controls and flexibilities, and employee training appropriate for the particular phase. Depending on your industry (e.g., construction, health care), there may be more specific requirements.

State and local reopening requirements, such as from the **New York State Department of Health**, are another source of guidance on employers' safety obligations. Employers should also consult the **CDC** for the latest information about the pandemic.

Below are areas of workplace safety and health that employers should consider, and suggested examples for how to address them. The examples below are based on current guidance from OSHA, as well as the reopening requirements published by the New York State Department of Health for office settings, and are not exhaustive. Regulations, state, and local laws specific to your location and industry may apply and may change over time. Please contact us directly for help with your specific situation.

**a. Workplace measures**

- i. **Hazard assessment:** OSHA recommends assessing job tasks performed by employees to determine which tasks involve risk of exposure to COVID-19, considering, among other things, exposure from members of the public with whom workers interact, as well as from coworkers, and current outbreak conditions in the community.
- ii. **Hygiene:**
  - 1. **OSHA:**
    - a. Provide soap, water and paper towels for workers, customers and visitors to wash hands, and encourage frequent and proper (for at least 20 second) handwashing.
    - b. Provide hand sanitizer with at least 60% alcohol and encourage workers to use it when they cannot wash their hands.
    - c. Identify high-traffic areas and frequently touched surfaces and target them for cleaning and disinfection with EPA-registered disinfectants and in accordance with CDC guidelines.
  - 2. **NYS requirements (for office work):**
    - a. Follow hygiene and disinfection requirements as advised by the CDC and NY Department of Health.
    - b. Provide and maintain hand hygiene stations at the office, including: i) running warm water, soap and disposable paper towels; ii) an alcohol-based hand sanitizer containing at least 60% alcohol throughout common areas in the office. Provide signage indicating that visibly soiled hands should be washed with soap and water.
    - c. Place receptacles around the office for disposal of soiled items, including PPE if applicable.
    - d. Provide appropriate disinfection supplies for shared and frequently touched surfaces.

- e. Conduct regular cleaning and disinfection of the building/office and more frequent disinfection of high risk areas used by many individuals (after each shift, daily, or more frequently as needed). Follow the Department of Health’s detailed “Interim Guidance for Cleaning and Disinfection of Public and Private Facilities for COVID-19.”
- f. Restrooms should be cleaned and disinfected more often depending on frequency of use.
- g. Have a plan to provide for the cleaning and disinfection of exposed areas in the event an individual is confirmed to have COVID-19, including all heavy-transit areas and high-touch surfaces. Follow CDC guidelines for “Cleaning and Disinfecting Your Facility” if someone is suspected or confirmed to have COVID-19.
- h. Prohibit shared food and beverages among employees, encourage employees to bring lunch from home, and ensure there is space to observe distancing while eating.

iii. **PPE:**

1. **OSHA:**

- a. OSHA requires employers to assess whether PPE, such as shields, gowns, gloves, surgical masks, etc., are needed at their worksite.
- b. Cloth face coverings are not technically PPE (because they protect other people from the wearer’s respiratory secretions but not the wearer) but can and should be worn to reduce the spread of the coronavirus.

2. **NYS requirements (for office work):**

- a. Refer to OSHA guidelines for PPE in industries that require it.
- b. In addition to PPE that is necessary for specific workplaces/activities, employers must provide acceptable face coverings for employees at work at no cost to the employee.

- c. Face coverings must be cleaned or replaced after use and may not be shared. Follow CDC guidance for information on appropriate use and cleaning.
- d. Advise employees and visitors to wear face coverings in common areas, including elevators, lobbies, and when traveling around the office.
- e. Put in place measures to avoid sharing of objects and limit touching of shared surfaces.

iv. **Social distancing:**

1. **OSHA:**

- a. Limit business occupancy to a number of workers/customers that can be safely accommodated to allow for social distancing.
- b. Demarcate flooring in six-foot zones in key areas where workers, customers or visitors would ordinarily congregate (*i.e.*, restrooms, check-out lines, areas with time clocks) to encourage people to keep appropriate social distance between themselves and others.
- c. Post signage reminding workers, customers and visitors to maintain at least six feet between each other.
- d. Post directional signs in hallways/corridors where the width restricts movement and limits social distancing.

2. **NYS requirements (for office work):**

- a. Work with building owners/managers to maintain capacity limits as applicable to the current phase of reopening.
- b. Ensure that people maintain a distance of at least six feet from each other, unless the safety of a core activity to the business requires a shorter distance.
- c. Any time an individual must be within six feet of another person, face coverings that cover both mouth and nose must be worn.

People must be prepared to don a face covering if someone unexpectedly comes within six feet.

- d. Consider closing common indoor or outdoor seating areas (*e.g.*, reception areas) or areas where people congregate, or, if such areas must remain open, modify seating arrangements to ensure people are six feet apart. Non-essential common areas (*e.g.*, gyms, pools, game rooms) must remain closed.
  - e. Modify or reconfigure use of and/or restrict the number of workstations so that workers are at least six feet apart in all directions, and are not sharing workstations without cleaning and disinfection before use. If distancing between workplaces is not feasible, provide and require use of face coverings or safe physical barriers.
  - f. Prohibit use of small spaces (*e.g.*, elevators, supply rooms, personal offices, vehicles) by more than one person at a time, unless all individuals are wearing acceptable face coverings. Even when face coverings are in use, occupancy must never exceed 50% of the maximum capacity of the space or vehicle.
  - g. Reduce bi-directional foot traffic using tape or signs with arrows in narrow aisles, hallways, or spaces, and post signage and distance markers denoting spaces of six feet in commonly used areas where people line up or congregate.
- v. **Identification and isolation of sick employees/visitors:**
- 1. **OSHA:**
    - a. Ask employees to evaluate themselves for signs and symptoms of COVID-19 before coming to work, and to stay home if they are not well.
    - b. Establish a protocol for managing people who become ill in the workplace, including details about how and where a sick person will be isolated in the event they are unable to leave immediately, and cleaning and disinfecting spaces the ill person

has occupied to prevent exposure to other workers, customers or visitors.

- c. Employers may need to collaborate with state and local health officials to notify them of potential cases and facilitate contact tracing.

**2. NYS requirements (for office work):**

- a. Implement mandatory, daily health screening practices of employees, and, where practicable, visitors (though such screening shall not be mandated for delivery personnel).
  - i. Screening may be performed remotely (e.g. by telephone or electronic survey), before the employee or visitor reports to the office to the extent possible, or on site.
  - ii. Screening should be coordinated to prevent people from intermingling in close contact.
  - iii. At a minimum, screening must be required for all employees and visitors that includes a questionnaire about whether the person has:
    - 1. Knowingly been in close contact in the past 14 days with anyone who has tested positive for COVID-19 or has symptoms of COVID-19;
    - 2. Tested positive for COVID-19 in the past 14 days; and/or
    - 3. Experienced any symptoms (based on current CDC guidance) of COVID-19 in the past 14 days.
  - iv. Designate a central point of contact for receiving and attesting to having reviewed all employees' responses to questionnaires and for receiving reports about employees experiencing symptoms. Designate a site safety monitor who ensure compliance with the safety plan.

- v. Coordinate with building managers to facilitate screening where possible.
- vi. Require employees to immediately disclose if their responses to any of the screening questions changes.
- vii. Temperature checks may also be conducted. While employers should not keep records of specific employee temperatures, they may confirm that individuals were screened and the result of such screening (e.g., pass/fail).
- viii. Personnel performing screening activities must be appropriately protected (with at least a face mask, and potentially a gown, gloves or face shield) and trained based on CDC, DOH and OSHA protocols.
- ix. Individuals who screen positive must not be allowed to enter the office and must be sent home with instructions to contact their healthcare provider for assessment and testing. Provide employees with information about testing resources and ensure that they inform state and local health departments if they test positive.
- x. To the extent possible, maintain a log of every person, including employees and visitors, who may have close or proximate contact with other individuals at the worksite, excluding delivery personnel, and their contact information, to facilitate contact tracing.

3. **Permitted medical inquiries, confidentiality, and discrimination:** The Americans with Disabilities Act (“ADA”) and other state and local disability discrimination laws restrict how and when an employer may ask for employees’ health information.

- a. In light of the pandemic, employers are permitted to ask employees about COVID-19 symptoms. Employers are also permitted to require employees to be tested for COVID-19 and to submit to temperature screenings.



- b. OSHA encourages employers to continue to consider workplace flexibilities such as remote work, sick and other forms of leave, and curbside pickup for customers where feasible. Make sure employees know what flexibilities are available and how to use them.

**2. NYS requirements (for office work):**

- a. Increase ventilation with outdoor air to the greatest extent possible.
- b. Post signage throughout office consistent with Department of Health COVID-19 signage reminding individuals to use face coverings, properly store and discard PPE, adhere to social distancing, report symptoms of or exposure to COVID-19, follow hand hygiene and disinfection guidelines, follow respiratory hygiene and cough etiquette.
- c. Use video- or tele-conferencing wherever possible to reduce in-person gatherings. Hold necessary in-person meetings in open, well-ventilated spaces, maintaining six feet of social distance and wearing appropriate face coverings.
- d. Stagger schedules and/or reduce in-office work hours for employees to observe social distancing. Encourage work from home where feasible.
- e. Limit on-site interactions, including establishing areas for pickups or deliveries with limited contact.

**viii. Employee training:**

**1. OSHA:**

- a. Train workers in the appropriate language about risks of exposure to SARS-CoV-2, what the employer is doing to protect them, and how they can protect themselves.
- b. Train workers about wearing cloth face coverings in the workplace, including any employer policies related to their use

and considerations for when cloth face coverings could cause or contribute to a workplace safety and health hazard.

- c. If applicable, as required by OSHA standards for PPE, and consistent with OSHA and CDC guidance, train workers how to put on, use and take off PPE; how to clean, maintain and store PPE; and PPE's limitations.

2. **NYS requirements (for office work):**

- a. Train employees on appropriate use of face coverings.
- b. If applicable, train employees on how to put on, take off, clean and discard PPE.
- c. Train employees on social distancing, PPE, face covering, health screening and hygiene protocols.

- ix. **Anti-retaliation:** Make sure workers understand their rights to a safe and healthful work environment, their rights to seek an OSHA inspection, who to contact with questions or concerns about workplace safety and health and that retaliation for raising safety and health concerns is prohibited. Ensure supervisors are familiar with workplace flexibilities in light of COVID-19 and workers' rights in general.

- b. **Work-related travel:** As with in-person meetings, employers should consider workplace flexibilities, such as videoconference, that reduce the need for work-related travel. Be aware of travel advisories and risk assessments from the CDC and state and local governments. For example, New York has required persons traveling from several states to quarantine upon arrival in New York, with limited exceptions for essential workers.

- 2. **Policy updates:** As noted above with respect to training, employees must know about safety measures and requirements in order for them to be effective. Businesses should clearly communicate policies on the following topics to employees. This may be in the form of a supplement to the Employee Handbook, or by other means.

It is important that employees buy into safety measures and feel safe. Therefore, employers should set a tone at the top that communicates that safety is their top priority, that management is complying with the safety protocols required for all employees, and that there is an open line of

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communication to a point person or department regarding requests for accommodations and concerns surrounding COVID-19.

- a. **Hygiene, social distancing and PPE:** Explain protocols (examples of which are discussed above) for hygiene, social distancing, face coverings and PPE, if applicable). Explain measures the business is taking to protect employees, visitors and customers.
- b. **Workplace accommodations:** Explain the procedure and point of contact for requesting workplace accommodations (discussed further below). Covered employers must also give employees notice of their rights to leave under the federal [Families First Coronavirus Response Act \(“FFCRA”\)](#) and applicable state and local laws like New York’s new law granting [Paid Family Leave for COVID-19](#)-related reasons. Consult us if you have questions about which laws apply to you, as laws may vary in their application based on employer size and revenue.
- c. **Anti-discrimination and anti-retaliation:** Although businesses should already have an anti-discrimination policy, businesses may wish to remind employees that they will not tolerate discrimination based on protected characteristics, including discrimination specific to COVID-19. Protected characteristics include race, national origin, color, sex (which includes sexual orientation and gender identity), religion, age, disability, pregnancy or genetic information under federal law. Under New York State and New York City law, there are additional protected characteristics, including marital status or partnership status, alienage or citizenship status, caregiver status and military status, among others. Consult us if you have a question about who is protected under your state or local laws.

Employers cannot fire employees, send them home or tell them not to come back to work because they think employees may have been exposed to the coronavirus based solely on a protected characteristic, such as the employees’ race, national origin or disability. Employers also cannot fire employees, send them home or tell them not to come to work solely because they think employees may be at higher risk for coronavirus based on a protected characteristic, such as disability or age. If the employee requests an accommodation, as discussed further below, the employer must engage in a cooperative dialogue to determine whether an accommodation is feasible.

Make sure workers understand that retaliation for raising discrimination concerns or requesting accommodations is prohibited.

- d. **Identification and isolation of sick employees/visitors:** Explain the procedure for employee health screens, employees' obligations to report symptoms and to stay home if they are sick, confidentiality of medical information and the point of contact for reporting health information.
3. **Workplace accommodations and leave:** Some employees may be entitled to workplace accommodations and/or leave for reasons related to the pandemic.
  - a. **Disabilities/susceptibility to COVID-19:** While employers cannot prohibit employees from returning to work based solely on the assumption that they will require accommodations based on their age or medical condition, employers must engage in an interactive process with employees who need accommodations based on disability. Employers should engage in this process with an employee who requests an accommodation, and should reach out to the employee if the employer knows or has reason to know the employee may need an accommodation.
    - i. **COVID-19 and disabilities:** Employers already have existing obligations to engage in the interactive process and provide reasonable accommodations to employees with disabilities, but COVID-19 may require additional accommodations because certain employees may be at higher risk for serious illness due to disabilities. For example, the following conditions that put individuals at higher risk for serious illness with COVID-19 may also be considered disabilities: kidney disease; chronic obstructive pulmonary disease ("COPD"), weakened immune system, obesity, heart conditions, sickle cell anemia and diabetes. State and local laws may include differing or more expansive definitions of disabilities. While pregnancy is not necessarily a disability, New York City's Commission on Human Rights has noted that pregnant individuals may require accommodation related to COVID-19.
    - ii. **Age:** Federal, state and local age discrimination laws prohibit discrimination based on age. The federal Age Discrimination in Employment Act ("ADEA") prohibits employment discrimination against individuals age 40 and older. Some state and local age discrimination laws, like those in New York, are not restricted to individuals age 40 and older. The ADEA would prohibit a covered employer from involuntarily excluding an individual from the workplace based on their being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee. Unlike the ADA, the ADEA does not require employers to make reasonable accommodations based on age. But employers

may provide flexibility to employees who are at higher risk for COVID-19 due to their age, and health authorities are encouraging maximum flexibility to limit the spread and danger of COVID-19 in the workplace. Employers should be sure to offer workplace flexibilities to all employees on a consistent basis. Older workers may also have medical conditions that qualify as disabilities under the ADA and therefore necessitate reasonable accommodation.

- iii. **What is a reasonable accommodation?:** What constitutes a reasonable accommodation depends on the workplace, the employee's needs and hardship on the employer. This is why employers are required to engage in an interactive dialogue with the employee to determine what accommodations are necessary and feasible. Accommodations could be changes to the work environment, schedule or temporary changes to marginal job duties and/or telework, among others. An accommodation is not reasonable if it imposes an undue hardship on the employer. With respect to the ADA, the EEOC has issued guidance regarding how to assess undue hardship for employers. Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources. But, the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration. Also relevant is the amount of discretionary funds available at this time - when considering other expenses - and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted). For questions about undue hardship, please consult us because the issue is highly fact-specific.

- b. **Leave laws:** Employees may be entitled to leave under long-existing sick-leave and family-leave laws, or under newer laws passed as a result of the pandemic.

- i. **Families First Coronavirus Response Act ("FFCRA"):** The FFCRA applies to private sector employers with fewer than 500 employees, as well as certain public sector employers. There are exemptions, such as for health care employees and some small businesses. An employee covered by the FFCRA is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to telework, because the employee:

- 1. **Is subject to a Federal, State, or local quarantine or isolation order related to COVID-19** → Up to two weeks (80 hours, or a part-time employee's two-week equivalent) paid leave at 100% pay, up to \$511 daily and \$5,110 total.

2. **Has been advised by a health care provider to self-quarantine related to COVID-19** → Up to two weeks (80 hours, or a part-time employee's two-week equivalent) paid leave at 100% pay, up to \$511 daily and \$5,110 total.
3. **Is experiencing COVID-19 symptoms and is seeking a medical diagnosis** → Up to two weeks (80 hours, or a part-time employee's two-week equivalent) paid leave at 100% pay, up to \$511 daily and \$5,110 total.
4. **Is caring for an individual subject to an order described in (1) or a self-quarantine as described in (2)** → Up to two weeks (80 hours, or a part-time employee's two-week equivalent) paid leave at 2/3 pay, up to \$200 daily and \$2,000 total.
5. **Is caring for his or her child whose school or place of care is closed, or whose child care provider is unavailable) due to COVID-19 related reasons** → Up to 12 weeks of paid leave at 2/3 pay, up to \$200 daily and \$12,000 total. Note that the employee must have been employed for at least 30 calendar days to receive this benefit.
6. **Is experiencing any other substantially-similar health condition specified by the U.S. Department of Health and Human Services** → Up to two weeks (80 hours, or a part-time employee's two-week equivalent) paid leave at 2/3 pay, up to \$200 daily and \$2,000 total.

**Employers will be reimbursed for these paid leaves with federal tax credits.** The IRS has published guidance for how to document leaves and claim credits.

FFCRA paid sick leave is **in addition to accrued sick or vacation leave** already provided by the employer. However, the expanded FMLA leave to care for children for reason (5) above is not in addition to FMLA leave already taken by the employee in a 12-month period. Employees are limited to a total of 12 weeks of FMLA leave in a 12-month period.

**DOL guidance.** The U.S. Department of Labor ("DOL") has published extensive guidance and [Q&A documents](#) regarding application of the FFCRA. Please consult us if you have specific questions.

**Updated regulations.** A federal court in New York ruled in August that certain DOL regulations implementing the FFCRA were unlawful. The New York court

found that: (1) FFCRA leave is available even where the employee did not have work available; (2) the health care employee exemption was too broad; (3) the employee does not need the employer's consent to get intermittent leave; and (4) the employee does not need to provide documentation justifying the leave *before* taking leave.

On September 11, 2020, the DOL issued revised FFCRA regulations in response to the federal court decision invalidating portions of its prior regulations. The DOL: (1) reaffirmed that an employee may only take leave under the FFCRA if they have work available; (2) reaffirmed that the employer must agree for an employee to take intermittent leave under the FFCRA, but clarified that in the case of hybrid attendance models for schools, the need for leave is not "intermittent"; (3) clarified the definition of "health care providers" exempt from the FFCRA leave requirements; and (4) clarified when and how the employee must provide notice and documentation supporting the need for leave.

### **Intermittent leave**

Although employees must still obtain their employer's agreement to take intermittent leave, the DOL clarified its interpretation of "intermittent" in the context of school closures. The DOL stated:

**The employer-approval condition would not apply to employees who take FFCRA leave in full-day increments to care for their children whose schools are operating on an alternate day (or other hybrid-attendance) basis** because such leave would not be intermittent. In an alternate day or other hybrid-attendance schedule implemented due to COVID-19, the school is physically closed with respect to certain students on particular days as determined and directed by the school, not the employee. The employee might be required to take FFCRA leave on Monday, Wednesday, and Friday of one week and Tuesday and Thursday of the next, provided that leave is needed to actually care for the child during that time and no other suitable person is available to do so. For the purposes of the FFCRA, each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day.

### **New definition of "health care providers" excluded from FFCRA leave**

The new DOL rules define “health care providers” excluded from FFCRA leave as:

1. Employees that meet the definition of that term under the existing FMLA regulations. This includes doctors of medicine and osteopathy and “others capable of providing health care services,” which include podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers, physician assistants, certain Christian Science practitioners.
2. Employees “employed to provide diagnostic services, preventive services, treatment services or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care.”

Though the new definition is still somewhat vague, the DOL did clarify that the following employees **may still be excluded from FFCRA leave**:

1. nurses, nurse assistants, medical technicians and others directly providing diagnostic, preventive, treatment or other integrated services;
2. employees providing such services “under the supervision, order, or direction of, or providing direct assistance to” a health care provider; and
3. employees who are “otherwise integrated into and necessary to the provision of health care services,” such as laboratory technicians who process test results necessary to diagnoses and treatment.

The following employees **may not be excluded from FFCRA leave**: employees who do not actually provide health care services, such as IT professionals, building maintenance staff, human resources personnel, cooks, food services works, records managers, consultants, and billers. This list is illustrative, not exhaustive.

Please consult us if you have a question about whether you or your employee qualifies as a “health care provider” under the new FFCRA rules.

### Employee documentation of need for leave

The DOL clarified that documentation required may be given “as soon as practicable, which in most cases will be when the employee provides notice” of the need for FFCRA leave.

- ii. **New York’s Paid Family Leave for COVID-19:** New York now requires all employers to offer leave to employees who are unable to work or telework because they are subject to a mandatory or precautionary order of quarantine or isolation for COVID-19, issued by the state of New York, the Department of Health, local board of health or any government entity duly authorized to issue such order, or whose minor dependent child is under such an order. Instructions on obtaining an order are available [here](#).
  1. **Small businesses** with 10 or fewer employees as of Jan. 1, 2020 and with a net annual income less than \$1 million last year must provide **unpaid, job-protected leave** for the duration of the order of quarantine or isolation. Employees can access benefits from the combination of the employer’s Paid Family Leave and disability benefits policies.
  2. **Medium businesses** with 11-99 employees as of Jan. 1, 2020 and smaller employers with a net annual income of over \$1 million last year must provide job-protected leave for the duration of the order of quarantine or isolation, including at least **5 days of paid sick leave**. Employees can access benefits beyond the 5 paid days from the combination of the employer’s Paid Family Leave and disability benefits policies.
  3. **Large businesses** with 100 or more employees as of Jan. 1, 2020 must provide **up to two weeks of paid sick leave**, and job-protected leave for the duration of the order of quarantine or isolation.
  4. **Public employers (of all sizes)** must provide **up to two weeks of paid sick leave**, and job-protected leave for the duration of the order of quarantine or isolation.

Guidance for employers responding to requests for leave is available [here](#).

This leave is **in addition to accrued leave** already provided by the employer. This leave is generally not available to employees eligible for federal leave (like FFCRA), but if the state benefit would be greater than the federal benefit, the employee should receive the difference between the two.

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Employees who are subject to orders of quarantine or isolation after non-work-related travel to countries for which the CDC has a level two or three travel notice, or to states for which New York has issued a [travel advisory](#), will not be eligible for this leave.

- iii. **Sick leave:** Employees may have accrued sick leave that they can use to cover COVID-19-related absences. Paid and unpaid sick leave is mandated by several state and local laws.
- iv. **Family and Medical Leave Act (“FMLA”) leave:** Employees with serious health conditions or who are caring for family members with serious health conditions related to COVID-19 may be entitled to up to 12 weeks of unpaid, job-protected leave if they work for a covered employer (generally, private employers with 50 or more employees and certain public employers regardless of size), and they have worked for the employer for at least 12 months (which need not be consecutive) and have worked at least 1,250 hours in the 12 months immediately preceding the leave. The FMLA allows for leave for the employee’s own serious health condition that prevents the employee from working, or for care of a spouse, child or parent with a serious health condition.
- v. **Leave as an accommodation under the ADA or other disability discrimination laws:** In some circumstances, leave may be considered a reasonable accommodation for an employee’s disability. Please consult us if you have questions about a particular situation, because what constitutes a reasonable accommodation is fact-specific.

4. **Second wave contingency planning:** As we have seen in recent weeks and months, cases of COVID-19 have risen in certain areas, requiring renewed restrictions. Businesses should plan for subsequent virus outbreaks and renewed restrictions, even in areas that have reopened. With respect to employment, such plans may include:

- a. Assessing how your business responded to the first wave of coronavirus infections and closures, and what improvements you can make, including with regard to decision-making and keeping employees informed and reassured;
- b. Assessing PPE supplies and workplace safety measures to ensure you are ready to take action to protect employees immediately;
- c. Assessing and improving tools for remote work, such as hardware and software, so that remote work is sustainable;

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- d. Supporting employee morale and mental health with reassuring messaging and effective, clear communication (for example, some employers have used employee surveys to gauge comfort with return-to-office plans);
- e. Knowing your legal obligations and having clear processes in place with respect to employee illness, accommodation requests, leave and the potential need for furloughs or reductions in force;
- f. Understanding your options with respect to a reduction in work available for employees, including shared work programs offered by state departments of labor, which may offer different or greater benefits to employees than unemployment benefits.

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Please feel free to contact us if you have questions or need further guidance about your particular situation. The attorneys of our [Employment practice group](#) would be happy to assist you. Please note, this guide is intended as a general discussion of these matters and legal issues only, and is not considered to be legal advice or relied upon in connection with any particular situation. We wish you all continued success, safety and well-being in these challenging times. We are here to help.

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